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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 JOHN LEONARD CALVERT,

8 Petitioner,

9 v.

10 CHARLIE DANIELS and ROB
11 MCKENNA,

12 Respondents.
13

NO. CV-05-077-RHW

**ORDER DENYING
PETITIONER'S MOTION FOR
RECONSIDERATION,
GRANTING EXTENSION**

14 Before the Court are Mr. Calvert's Motion for Reconsideration of Stay and
15 Abeyance (Ct. Rec. 37) and his Motion for Extension of Time (Ct. Rec. 40).
16 Petitioner proceeds *pro se* with this petition. In an order issued May 5, 2006, the
17 Court found Mr. Calvert's petition was mixed in that it contained one exhausted
18 and eighteen unexhausted claims. The Court granted him leave to amend or, in the
19 alternative, to move for a stay and abeyance that would permit him an opportunity
20 to exhaust his unexhausted claims (Ct. Rec. 30). Mr. Calvert then timely filed a
21 document construed as a Motion for Stay and Abeyance and/or an Amended
22 Petition (Ct. Rec. 31). The Court denied that motion, granting Petitioner another
23 opportunity to amend his petition or show cause for a stay and abeyance within
24 thirty days (Ct. Rec. 36). The most recent filings are in response to this last Order.
25 Petitioner asks for reconsideration of the denial of his motion for a stay and
26 abeyance or, in the alternative, for an extension of time to amend his petition.

27 However, before this Court considers Petitioner's arguments for a stay and
28 abeyance, the Court must first determine whether a mandatory rule of state law

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precludes Mr. Calvert from raising his claims to the Washington Supreme Court. *Moreno v. Gonzalez*, 116 F.3d 409, 411 (9th Cir. 1997). If Mr. Calvert may raise his claims in state court, they are not barred from federal review, but they must first be exhausted in state court. *Id.* Likewise, if he cannot raise his claims in state court, issuing a stay and abeyance would be futile because exhaustion is precluded. *See id.*; *Shumway v. Payne*, 136 Wash. 2d 383, 390 (1998) (“If petitioner no longer has the right to seek review in state court, then federal review of the unexhausted claims is barred.”).

In *Shumway v. Payne*, the Washington Supreme Court considered two questions certified to it by the United States District Court for the Western District of Washington:

1. May petitioner obtain discretionary review of her [two unexhausted] claims now, upon a proper showing from counsel regarding her failure to seek such review earlier?
2. Does any mandatory rule of state law bar petitioner from raising these two claims at this time?

136 Wash. 2d at 387. These are the same two questions this Court must consider before going forward with Mr. Calvert’s petition. The Washington Supreme Court answered those questions in the context of that petitioner’s case and, in doing so, listed several exceptions that could apply to the rules of state law that act as procedural bars to post-conviction remedies. *Id.* at 392-400. Because this Court cannot assume Mr. Calvert would not be able to satisfy the exceptions listed in *Shumway*, the Court must conclude Mr. Calvert still has the ability to raise his claims in state court.

The background facts of Mr. Calvert’s original state court conviction and his procedural history are sufficiently outlined in this Court’s prior orders. However, Mr. Calvert filed supplemental documents with the pending motion to support his assertion that he could not have exhausted several claims in his second Personal Restraint Petition (PRP). Mr. Calvert filed a second PRP with Division III of the Washington Court of Appeals in 2001. Mr. Calvert submits a letter from his court-

1 appointed attorney dated October 19, 2004. The letter explains that Petitioner's
2 second PRP was dismissed on October 13, 2004, and that his attorney did not
3 intend to file a motion for discretionary review with the Washington Supreme
4 Court. (Ct. Rec. 41, at 3). The letter outlines the proper procedure required to file
5 for discretionary review, states the date by which Mr. Calvert was required to file
6 for discretionary review, and encourages Mr. Calvert to pursue the matter further to
7 exhaust his state remedies. (Id.). Mr. Calvert maintains he was in transit between
8 prisons at the time the letter was sent, and he did not receive this letter until
9 December 2004, after the deadline stated in the letter to file for discretionary
10 review. Thus, he asserts, there was "no way" he could have complied with the
11 time restraints for discretionary review.

12 As the Court explained in its Order Denying Petitioner's Motion for Stay
13 and Abeyance (Ct. Rec. 36), a district court may issue a stay and abeyance for a
14 mixed petition under very limited circumstances. *Rhines v. Weber*, 544 U.S. 269,
15 278 (2005). If a petitioner can show (1) good cause for failure to exhaust; (2) his
16 claims are potentially meritorious; and (3) he has not engaged in intentionally
17 dilatory litigation tactics, the district court should exercise its discretion to stay his
18 petition to permit exhaustion. *Id.*; *see also Jackson v. Roe*, 425 F.3d 654, 661 (9th
19 Cir. 2005).

20 **A. Good Cause**

21 Petitioner asserts there was good cause for his failure to exhaust. He states
22 he mistakenly thought exhaustion would be futile because he completed his state
23 prison term and is currently in federal custody, and because the State Court of
24 Appeals took three and one half years to issue an opinion regarding his second
25 PRP. He also says Division III of the Washington Court of Appeals would not
26 permit him to pursue his PRP *pro se*, and his appointed attorney would not argue
27 the issues he requested her to argue. Lastly, he submits the letter described above
28 as evidence that he was unable to file for discretionary review of his second PRP in

1 a timely manner due to circumstances beyond his control.

2 The Supreme Court did not outline the parameters of “good cause” for
3 failure to exhaust in *Rhines*. The Ninth Circuit has not yet provided a
4 comprehensive definition either, but the Court finds Judge Reed’s analysis in *Riner*
5 *v. Crawford*, 415 F. Supp. 2d 1207, 1210-11 (D. Nev. 2006), to be persuasive.
6 After examining various authority, Judge Reed concluded that

7 the good cause standard applicable in consideration of a request for
8 stay and abeyance of a federal habeas petition requires the petitioner
9 to show that he was prevented from raising the claim, either by his
10 own ignorance or confusion about the law or the status of his case, or
11 by circumstances over which he had little or no control, such as the
12 actions of counsel either in contravention of the petitioner’s clearly
13 expressed desire to raise the claim or when petitioner had no
14 knowledge of the claim’s existence.

15 *Id.* at 1211. One area in which this Court diverges from Judge Reed’s well-
16 reasoned analysis, however, is his inclusion of ignorance or confusion about the
17 law in his definition of “good cause.” The Court finds that the mere fact that a
18 petitioner is acting *pro se* or lacks knowledge of the law does not establish “good
19 cause” under *Rhines*. *Accord Riseley v. Warden, Pleasant Valley State Prison*,
20 2006 WL 1652657, at *2 n.3 (E.D. Cal. June 14, 2006) (citing *Hughes v. Idaho*
21 *State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986)).

22 The Court first notes Petitioner received the letter from his appointed
23 attorney in December 2004, only one month past the deadline to file for
24 discretionary review. He states his delayed reception of the letter outlining the
25 procedure for discretionary review was due to circumstances beyond his control,
26 but he does not supply any excuses for why he did not file for discretionary review
27 at the time he received it. He certainly could have asked for an exception to the
28 Washington Supreme Court’s thirty-day filing deadline for discretionary review
due to circumstances beyond his control. Mr. Calvert has no reasonable
explanation for being confused about the exhaustion status of his case considering
his attorney’s admonition in her letter cautioning him to pursue discretionary

1 review of his second PRP to exhaust his claims before challenging his conviction
2 in the federal system.

3 However, Mr. Calvert does insist that his court-appointed attorney refused to
4 raise the additional issues in his second PRP after he clearly requested she do so.
5 He also submits a letter from Division III dated June 17, 2004, returning his own
6 filings to him because he was represented by counsel, as evidence that he was not
7 permitted to introduce arguments he believed had merit *pro se*.

8 **B. Merits of Claims and Diligent Pursuit of Remedies**

9 Although the Court is not now deciding whether Mr. Calvert has
10 demonstrated good cause, to justify a stay and abeyance he must also meet the
11 second and third requirements imposed by the *Rhines* decision: He must show his
12 claims are not clearly meritless and that he has not been intentionally dilatory in
13 pursuing his post-conviction remedies. *Rhines*, 544 U.S. at 278.

14 As to the merits of Mr. Calvert's claims, he simply asserts they are
15 meritorious and relies on the documentation and argument submitted with his
16 original petition. The Court notes that Mr. Calvert says he asked his attorney to
17 argue his claims in his second personal restraint petition and she refused. His
18 attorney also states in her letter to him that, in her opinion, there was "no basis" to
19 successfully challenge the Court of Appeals' decision denying his second personal
20 restraint petition. Additionally, "at least two courts have determined that a claim
21 that may be procedurally defaulted in state court should be considered meritless in
22 a *Rhines* analysis." *Riner*, 415 F. Supp. 2d at 1211 (citing *Carter v. Friel*, 415 F.
23 Supp. 2d 1314, 1321-22 (D. Utah 2006); *Neville v. Dretke*, 423 F.3d 474, 480 (5th
24 Cir. 2005)). Mr. Calvert should address these concerns and support his assertions
25 of merit with more than conclusory statements to warrant a stay and abeyance in
26 this matter.

27 His attorney's letter also gave Mr. Calvert notice that he "may want to
28 pursue the motion [for discretionary review] yourself in order to exhaust your state

1 remedies.” (Ct. Rec. 41, at 3). Thus, Mr. Calvert had notice as early as December
2 2004 that several of his claims had not been exhausted. This Court alerted Mr.
3 Calvert to this problem again in its order in May 2006. Mr. Calvert has still not
4 begun the exhaustion process. Nevertheless, he contends that he has been
5 diligently “fighting” the state charges since his conviction and that he has complied
6 with all court rules and deadlines.

7 **C. Request for an Extension of Time**

8 Lastly, Mr. Calvert asks the Court for an extension of time to amend his
9 petition or file another motion for stay and abeyance. He states he is currently
10 being held at the Spokane County Jail and that he is under lock down 22 hours per
11 day, with only two hours per week of access to the law library. His legal materials
12 remain, for the most part, at the Federal Corrections Institute in Sheridan, Oregon.
13 Petitioner states he is being re-sentenced in Spokane on August 24, 2006. The
14 Court assumes he will be transferred back to FCI Sheridan in a timely manner after
15 his re-sentencing.

16 **D. Conclusion**

17 Because of the circumstances under which Petitioner is currently being held
18 and Petitioner’s partial showing in his request for a stay and abeyance, the Court
19 will grant him an extension of time. Petitioner will be given an opportunity to
20 show good cause for his failure to exhaust his unexhausted claims in state court,
21 and he must also demonstrate that his unexhausted claims are not plainly meritless
22 and that he has not been intentionally dilatory in his pursuit of post-conviction
23 remedies. Respondent shall be given an opportunity to respond, and Petitioner to
24 reply.

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Petitioner’s Motion for Reconsideration of Stay and Abeyance (Ct. Rec.
27 37) is **DENIED** with leave to renew.

28 2. Petitioner’s Motion for Extension of Time (Ct. Rec. 40) is **GRANTED**.

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1 3. The Court grants Mr. Calvert **thirty (30) days** from entry of this Order to
2 either (1) amend his petition to include only his exhausted claim, clearly presenting
3 and supporting with documentation his Petition for Writ of Habeas Corpus; or (2)
4 show good cause for his failure to exhaust his remaining claims in state court, to
5 demonstrate that these claims are not plainly meritless, and that he has been
6 diligent in his pursuit of *state court* remedies. Absent any action, or in the event
7 Mr. Calvert submits a third mixed petition, the Court shall dismiss his Petition with
8 prejudice. Respondents shall thereafter have **twenty (20) days** to respond.
9 Petitioner shall thereafter have **fifteen (15) days** to reply.

10 4. The District Court Executive shall **set** a case management deadline
11 **ninety (90) days** from the entry of this Order.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
13 Order and forward copies to counsel and Petitioner.

14 **DATED** this 28th day of August, 2006.

15 *s/ Robert H. Whaley*

16 ROBERT H. WHALEY
17 Chief United States District Judge

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